***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S PETITION FOR REHEARING

76-7050

ORIGINAL

7069



In The

# United States Court of Appeals

For The Second Circuit

MARX & CO., INC., JOHN V. SUMMERLIN, JR., OTTO MARX, JR., WILLIAM D. FUGAZY and LOUIS V. FUGAZY,

*Plaintiffs-Cross-Appellants,*

*vs.*

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC., THE CONTINENTAL CORPORATION and THE CONTINENTAL INSURANCE COMPANY,

*Defendants-Cross-Appellees,*

THE DINERS' CLUB, INC., DINERS/FUGAZY TRAVEL, INC.,

*Defendants-Appellants,*

*vs.*

WILLIAM D. FUGAZY, LOUIS V. FUGAZY, JOHN V. SUMMERLIN, JR., OTTO MARX, JR., MARX & CO., INC. and F.T. VENTURES, INC.,

*Plaintiffs-Appellees.*

B P/S

## PETITION FOR REHEARING
**(Pursuant to Rule 40)**
**and**
## SUGGESTION FOR REHEARING IN BANC
**(Pursuant to Rule 35(b))**

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## PETITION FOR REHEARING
**(Pursuant to Rule 40)**
**and**
## SUGGESTION FOR REHEARING IN BANC
**(Pursuant to Rule 35(b))**

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petitioners plaintiffs-appellees and cross-appellants respectfully petition this Court for a rehearing of its decision of February 25, 1977 in the above entitled case, and respectfully suggest that the rehearing be heard in banc. This proceeding involves a question of exceptional importance as it sets forth principles relating to expert testimony given by an attorney.

Petitioners respectfully allege to this Court that the decision is inconsistent with the testimony adduced at the trial of this matter which testimony forms part of the record on appeal. As set forth in this petition the testimony is at variance with that presented as the basis for the decision of this Court.

In an opinion by Hon. Murray I. Gurfein, joined in by Hon. Robert P. Anderson and Hon. Paul R. Hays (who concurred in the disposition of the appeal but had not reviewed the opinion on account of illness), the Court held:

(a) That the breach of contract claim upon which a jury verdict was rendered in favor of the petitioners be reversed and remanded because of highly prejudicial testimony by petitioners' expert witness, an attorney duly admitted to the practice of law in the State of New York.

(b) Affirmed the dismissal by Judge Ward of petitioners Section 10(b) claim that, as a matter of law, the defendants made no material misrepresentations to petitioners, nor was there any reliance on any representations made by defendants.

## STATEMENT OF FACTS

Briefly stated the petitioners allege as follows:

(a) That defendants fraudulently induced them to sell the assets of their company, Fugazy Travel Bureau, Inc. to defendant Diners' Club in return for unregistered stock in the latter company, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; by virtue of various misrepresentations made by defendants; and

(b) That defendant Diners' Club breached its contractual obligation to petitioners by not using its best efforts to make effective a registration of petitioners' unregistered shares of stock of Diners' Club.

## ISSUES PRESENTED ON APPEAL

1. Whether the expert testimony given by an attorney was so highly prejudicial as to necessitate the setting aside of a jury verdict in favor of petitioners.

2. Whether the statements made by defendants constituted material misrepresentations of fact.

## ARGUMENT

### I.

**The testimony by petitioners' expert was not improperly prejudicial.**

The jury found against defendant Diners' Club on the breach of contract claim and this Court agreed with Judge Ward that there was sufficient evidence to support the verdict. However, this Court indicated in its opinion (p. 5) that the petitioners had made a *prima facie* case only through the testimony of Friedman, the expert witness. This finding is inaccurate. Judge Ward, in denying defendants' motion to dismiss this cause of action at the end of petitioners' case, prior to Friedman's rebuttal testimony, stated that the question was sufficiently presented to make out a *prima facie* case (A1352).[1] Thus a *prima facie* case had been made by petitioner *before* the testimony of Friedman who was called as a rebuttal witness on the last day of a three week trial.

In denying defendants' motion for judgment notwithstanding the verdict, the Trial Court stated as follows (A407, A408):

> "Although Diners' was requested to file a registration statement in mid-April, 1969, it is undisputed that Diners' did nothing to register the stock until late July, 1969, more than three months after receiving a letter requesting registration and almost two months after its

1. References are to the Joint Appendix filed on appeal.

> financial statement for the fiscal year ended March 31, 1969, became available. From the foregoing, the jury could reasonably infer that Diners' with the urging and approval of Herd and Johnson, decided to do nothing and thereby avoid its obligations under paragraph 10.2(b) of the agreement."

In further ruling that it was not prejudicial error to allow Friedman, an expert witness, to give his opinion the Trial Court concluded (A414):

> ". . . The admission of Friedman's expert testimony, subject to the limiting instruction given at trial, was a proper exercise of the trial court's discretionary power over the progress of the trial. *United States vs. Cohen,* Dkt. Nos. 74-2026-2027-2065 (2nd Cir., June 26, 1975)."

However, this Court in stating that Friedman improperly gave conclusions as to the legal significance of various facts, as contained on page 8 of its decision, states as follows:

> ". . . He testified on direct examination that, pursuant to its contractual obligation, Diners' Club 'should have' filed its registration on or about June 20, 1969, and not at the end of August, and therefore concluded that Diners' Club did *not* use its best efforts promptly to file."

I call to the attention of this Court the emphasis placed on the word "should have," and contrast this with the actual testimony of Friedman (A1512), where Friedman was asked if he had an opinion as to whether Diners' Club had used its best efforts:

> "Q. What is that opinion? A. That Diners' Club did not use its best efforts.

> Q. What is the basis of that opinion? A. I have stated that based on the considerations I just gave the registration statement *could have* been filed approximately by June 20. August 28th is some two months later." (Emphasis added.)

The considerations to which Friedman alludes is his detailed and well reasoned explanation of the registration process (A1509-A1512).

The findings of the Court as contained on page 11 of its opinion are erroneous and at variance with the actual testimony of Friedman. The Court alludes to the expert's *dogmatic view*, derived not from an analysis of the facts but rather directly from an SEC Report statistic, not justifying the categorical conclusions tendered to the jury by this witness. The Court concludes that this became an item of prejudicial overweight. I refer this Court to the testimony of Friedman, elicited on cross examination (A1573, A1574). The testimony of Friedman is a well reasoned analysis of a statistical report with an intelligent discussion of the variable factors to be considered in utilizing such information. There is nothing in Friedman's testimony to justify the Court's conclusions nor the inaccurate characterization of his testimony.

The Court, on page 8 of its opinion states that "Not only did Friedman construe the contract, but he also repeatedly gave his conclusions as to the legal significance of various facts adduced at trial," and on page 9 that "His conclusion that Diners' Club had no *legal* excuses for non-performance was based merely on his examination of documents and correspondence. . . ." and on page 10 that to the prompt objections that segments of Friedman's testimony were legal conclusions, the trial judge responded by refusing to strike the testimony and by telling counsel he could cross-examine.

These assertions by the Court are at variance and inconsistent with the testimony given by Mr. Friedman and the

instructions and limitations given by the Trial Court in regard to such testimony. A thorough analysis of Friedman's testimony will disclose intelligent, well reasoned testimony given by an extremely competent expert, properly limited by the Trial Court. The findings of this Court can not be supported by a reading of Friedman's entire testimony, Direct (A1499-A1526), Cross (A1526-A1580). Friedman's testimony did not usurp the function of the judge as alluded to in the opinion.

## II.

**The Court failed to properly apply the provisions of Rule 704 of the Federal Rules.**

In reversing judgment for plaintiffs and remanding this case for a new trial, this Court not only overturned a jury verdict acknowledged to have been amply supported by the evidence, but failed to properly apply the provisions of Rule 704 of the Federal Rules of Evidence.

Rule 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As explained in the Advisory Committee Note, this reform was directed at a rule found to have been unduly restrictive and difficult of application, generally serving only to deprive the trier of fact of useful information.

Plaintiffs' breach of contract claim involved a controversial subject in the field of securities regulation, which was clarified by a qualified expert. The testimony was relevant, competent and material, and therefore "otherwise admissible." In testifying as to the meaning of "best efforts" in the context of a covenant to register shares, Mr. Friedman was defining a word of art in securities regulation generally, in the light of his acknowledged experience.

In view of Rule 704, the testimony was not given in terms of hypotheticals and abstractions, but was keyed to the facts of this case. The trial judge gave careful limiting instructions. He told

the jury they were free to give the testimony any weight they deemed appropriate — great weight, moderate weight, little weight or no weight (A1503).

> THE COURT: Ladies and gentlemen, that means that this witness can be asked his opinion and he may testify to his opinion. You are to give his opinion such weight as you deem appropriate. That may be a great deal of weight, it may be moderate weight, it may be little weight, or no weight at all. From this point on, as distinguished from what I called fact witnesses, this witness may give his opinion because he has been qualified as an expert."

The Trial Court not only limited the weight to be given to the expert's testimony; the Trial Court in its charge to the jury instructed the jury as to the legal meaning of "best efforts" and as to what evidence to consider in returning the verdict (A1634-A1635). These instructions refute the inaccurate assertions of this Court contained on page 11 of its opinion.

The Trial Court has wide discretion in allowing expert testimony. See *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 42 (4th Cir. 1963); *Bridger v. Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966). Under the applicable Federal Rules of Evidence, 704 and 403, the Trial Court properly exercised its discretion in regard to this expert testimony and the Court of Appeals should not reverse the jury's verdict solely on the basis of that testimony.

## III.

**Defendants made material misrepresentations of fact which were relied upon by petitioners.**

The only question here presented is whether the defendants made material misrepresentations of fact. Testimony adduced at the trial indicated that petitioners relied on the representations of the defendants. See Marx testimony (A1278).

> "Q. Is it your testimony, Mr. Marx, that you would not have sold the assets of Fugazy Travel for those considerations that we have just mentioned without the additional representation about a takeover of Diners' by Continental? A. That is correct."

The Court also concluded that testimony was given as to reliance but that the only question was as to whether a misrepresentation had been made (A1340).

> "THE COURT: Yes, they testified as to reliance, and I am not about to take that away from the jury.
>
> MR. TOLAN: Lastly, has a misrepresentation been made?
>
> THE COURT: That is the real question, I think, has a material misrepresentation been made."

In its opinion on pages 18 and 19, this Court stated that ". . .The general statements which were made (viewing the evidence most favorably to plaintiffs) did not constitute material misrepresentation of fact," and "The general nature of the predictions precludes them from being representations of fact." In this respect the Court erred.

The standard of materiality was set forth by the Second Circuit in *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965). In *List*, the Second Circuit held a material fact to be one to which "a reasonable man would attach importance . . . in determining his choice of action in the transaction in question." *See Jackson v. Oppenheim*, CCH Fed. Sec. L. Rep. ¶ 94,894 (S.D. N.Y. 1974). Materiality has also been held to encompass those "facts about a corporation's business which in reasonable and objective contemplation might affect the value of the corporation's stock or securities . . . " *Kohler v. Kohler*, 319 F.2d 634, 642 (7th Cir. 1963).

As the representation that Continental was going to acquire Diners was of paramount importance to plaintiffs in their assessment of Diners and the value of Diners' stock to them, a reasonable investor would similarly have considered the representation important in making his investment decision. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153-4 (1972); *Schlick v. Penn-Dixie Cement Corp.,* 507 F.2d 374 (2d Cir. 1974); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.,* 480 F.2d 341, 374 (2d Cir. 1973); *Pierre J. LeLandais & Co., Inc. v. MDS-Atron, Inc.,* CCH Fed. Sec. L. Rep. ¶ 94,930 (S.D.N.Y. 1974).

The testimony of petitioner, William D. Fugazy, evidenced that Diners' Club desperately wanted to buy his company (A1010), and that this acquisition was desired by defendant, Continental, who would "own all of us very shortly" (A1017), see also (A1019, A1020). Alfred Bloomingdale, Chairman of the Board of Diners' Club represented to both William Fugazy and Louis Fugazy that the takeover was imminent (A1204).

Mr. Fugazy further testified that in a meeting with Mr. Victor Herd, Chairman of the Board of Continental Insurance Company, and Harold Johnson, its Executive Vice-President, and in response to his query as to whether Continental was going to buy the rest of Diners, he was told "Well, you don't court a girl unless you are going to marry her." (A1040).

Petitioner, Otto Marx, Jr., testified as to his concern about Diners' Club finances if not taken over by Continental (A1235, A1236) and that he was assured there would be a takeover by Continental at approximately $45 a share (A1240, A1241). On cross examination Marx testified that "Mr. Bloomingdale told me several times that it was absolutely definite that the Continental takeover would be effectuated and that the price would be $45 per share" (A1303).

In *Hanly v. SEC,* 415 F.2d 589 (2nd Cir. 1969), a landmark case, this Court fully discussed those statements which would constitute affirmative misrepresentations. With reference to

statements made by Hanly, the Court concluded the following to be material misrepresentations:

> ". . . . that it would merge with another company in the *near future;* and that its stock would rise from 8 to 12 or 15 in a short time." (Emphasis added.)

This Court concluded that such optimistic representations or recommendations were materially false and misleading. The Court further concluded that the *sophistication* of the customers was irrelevant.

In view of the above cited testimony and cases it was error for the Trial Court, as a matter of law, to dismiss this cause of action. The representations made by defendants were made to induce petitioners to sell the assets of their company to Diners. These fraudulent representations of an imminent takeover by defendant, Continental, at a price of $45 per share constituted material misrepresentation by defendants with intent to deceive petitioners. It is further concluded that petitioners did rely and had a right to rely on these representations.

In view of the foregoing plaintiffs established a *prima facie* case which should have been submitted to the jury.

## CONCLUSION

For all of the reasons set forth above and in the papers previously submitted and on file with this Court, this petition should be granted and the order appealed from should be reviewed by this Court sitting in banc.

Dated: New York, New York
March 10, 1977

Respectfully submitted,

LIAN & GERINGER
*Attorneys for Petitioners*

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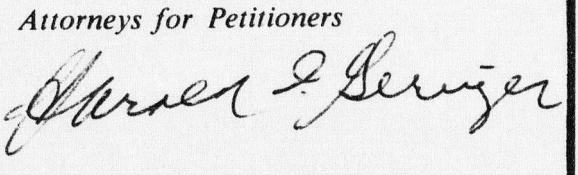

**FEDERAL COURT**
**SECOND CIRCUIT**

MARX & CO. Et Al
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vs.
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Plaintiffs-Appellees.

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*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* **New York** *ss.:*

*I,* Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York

*That on the* **11th** *day of* **March** *19* 77 *at* **One Dag Hammarskjold Plaza New York, N.Y.**

*deponent served the annexed* **Petition** *upon* **Hardee, Barovick Konecky & Braun**

*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* **attorneys** *herein,*

*Sworn to before me, this* 11th *day of* **March,** *19* 77

Victor Ortega

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977